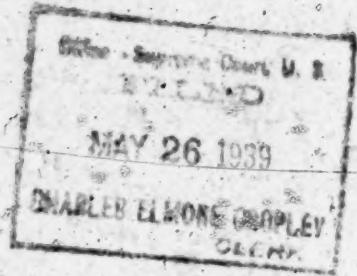




FILE COPY



993 72

No. — **888**

---

**In the Supreme Court of the United States**

**OCTOBER TERM, 1938**

---

**UNITED STATES OF AMERICA, PETITIONER**

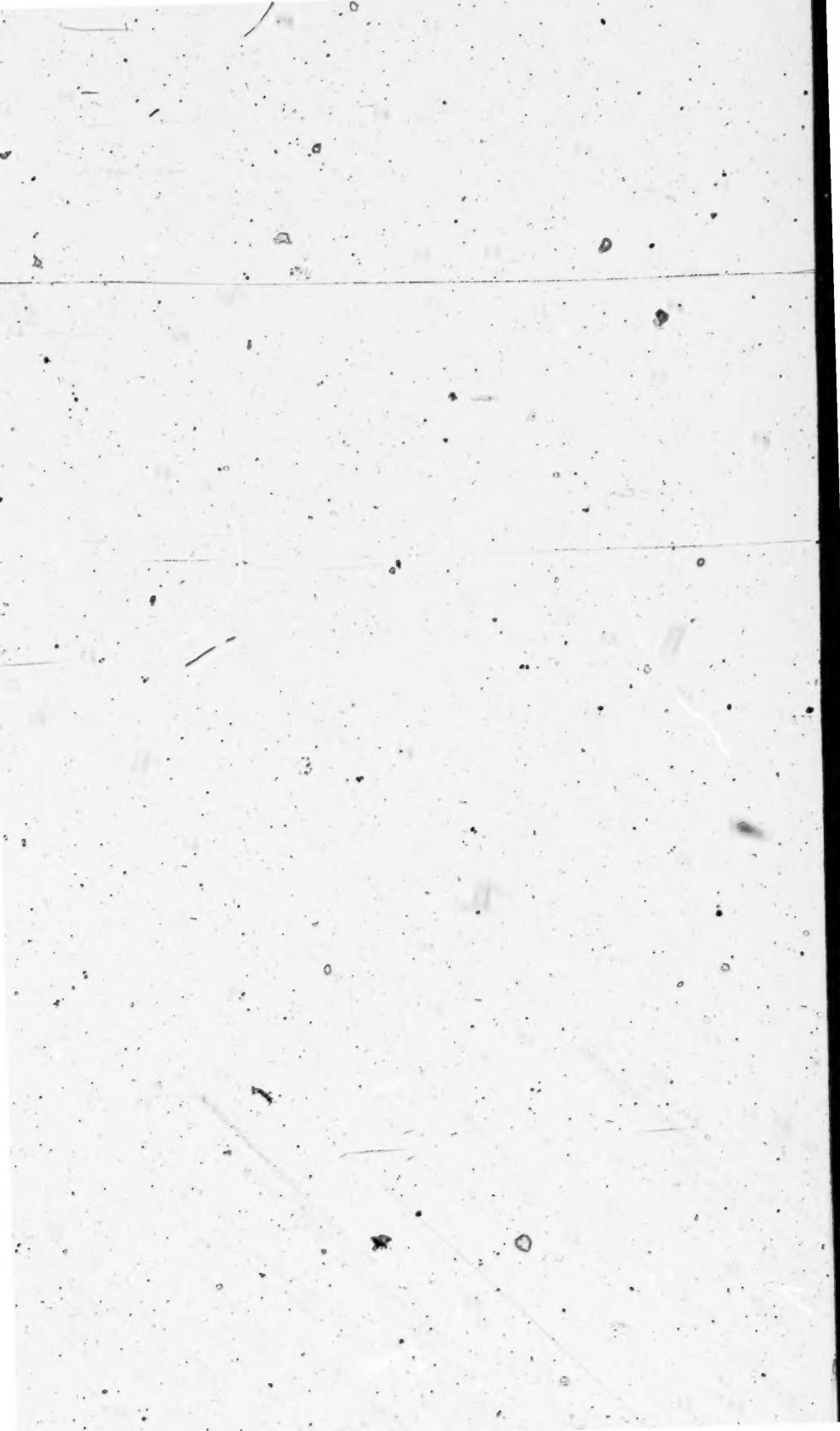
**v.**

**MRS. JULIA CAROLINE SPONENBARGER ET AL.**

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT**

---



# INDEX

	Page
Opinions below.....	1
Jurisdiction.....	2
Question presented.....	2
Statutes involved.....	2
Statement.....	2
Location and character of respondent's property.....	3
The Jadwin flood-control plan.....	4
Action taken pursuant to the plan.....	6
Effect of the plan on respondent's land.....	8
Specification of Errors to be urged.....	10
Reasons for granting the writ:	
I. The decision of the court below that respondent's land has been "taken" within the meaning of the Fifth Amendment is in probable conflict with the applica- ble decisions of this Court.....	11
II. The decision below is in conflict with the decision of the Court of Claims in <i>Matthews v. United States</i> , 87 C. Cls. 662.....	20
III. The question as to what acts constitute a "taking" is already pending in this Court.....	22
IV. The question involved is of large public importance.....	23
Conclusion.....	24
Appendix.....	25

## CITATIONS

### Cases:

<i>Court of Marion County, W. Va. v. United States</i> , 53 C. Cls. 120, 150-151.....	13
<i>Franklin v. United States</i> , No. 845, October Term, 1938.....	22
<i>Gibson v. United States</i> , 166 U. S. 269, 276.....	18
<i>Hughes v. United States</i> , 230 U. S. 24.....	13, 15, 16
<i>Hurley v. Kincaid</i> , 285 U. S. 95.....	8, 15, 19, 24
<i>Jackson v. United States</i> , 230 U. S. 1.....	14, 17
<i>Kirk v. Good</i> , 13 F. Supp. 1020, 1021.....	13
<i>Matthews v. United States</i> , 87 C. Cls. 662.....	18, 20, 21
<i>Peabody v. United States</i> , 231 U. S. 530.....	13
<i>Sanguinetti v. United States</i> , 264 U. S. 146.....	11, 15
<i>Transportation Co. v. Chicago</i> , 99 U. S. 635.....	13
<i>United States v. Cress</i> , 243 U. S. 316.....	13
<i>United States v. Gamble-Skogmo</i> , 91 F. (2d) 372.....	16

## II

### Cases—Continued.

	Page
<i>United States v. Lynch</i> , 188 U. S. 445.....	13
<i>United States v. Yazoo &amp; M. V. R. Co.</i> , 4 F. Supp. 368, rev'd, 67 F. (2d) 1019.....	23
<i>Wessel v. United States</i> , 49 F. (2d) 137.....	16
<i>Willink v. United States</i> , 240 U. S. 572.....	11, 12

### Statutes:

Act of March 3, 1899, c. 425, 30 Stat. 1152 (U. S. C., Title 33, Sec. 408).....	19
Act of July 27, 1916 (c. 260, 39 Stat. 402; U. S. C., Title 33, Sec. 65).....	18
Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534 (U. S. C., Title 33, Sec. 702a):	
Sec. 1.....	25
Sec. 2.....	27
Sec. 3.....	27
Sec. 4.....	29
Sec. 8.....	30
Sec. 9.....	31
Act of June 15, 1936, c. 548, 49 Stat. 1508 (U. S. C., Supp., Title 33, Sec. 702a-2).....	31
Sec. 1.....	31
Sec. 2.....	32
Sec. 10.....	32

### Miscellaneous:

69 Cong. Rec. 7114-7115.....	19
Comm. Doc. No. 2, H. Comm. on Flood Control, 71st Cong., 1st Sess.....	19
H. Doc. No. 90, 70th Cong., 1st Sess.....	4
Comm. Doc. No. 28, H. Comm. on Flood Control, 70th Cong., 2d Sess.....	7
S. 3740, 70th Cong., 1st Sess.....	19

# **In the Supreme Court of the United States**

**OCTOBER TERM, 1938**

**No. —**

**UNITED STATES OF AMERICA, PETITIONER**

**v.**

**MRS. JULIA CAROLINE SPONENBARGER ET AL.**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Eighth Circuit to review the judgment of that court entered in the above case on February 9, 1939, which reversed a judgment of the United States District Court for the Eastern District of Arkansas.

## **OPINIONS BELOW**

The opinion of the District Court (R. 376-390) is reported in 21 F. Supp. 28, and its opinion on motion for a new trial (R. 92-94) is reported in 21 F. Supp. 895. The opinion of the United States

Circuit Court of Appeals for the Eighth Circuit (R. 410-421) is reported in 101 F. (2d) 506.

#### **JURISDICTION**

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered on February 9, 1939 (R. 421). A petition for rehearing was denied on February 27, 1939 (R. 425). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

#### **QUESTION PRESENTED**

Whether, under the circumstances of the present case the United States has "taken" respondent's property within the meaning of the Fifth Amendment, and has thereby become liable to pay just compensation.

#### **STATUTES INVOLVED**

The relevant portions of the statutes involved are set out in the Appendix, *infra*, pp. 24-31.

#### **STATEMENT**

This suit, which was brought under Section 24 (20) of the Judicial Code, was begun by the filing of a petition on August 11, 1934, by respondent Julia C. Sponenbarger (R. 4-16). In general, the petition alleged that by the Flood Control Act of 1928 and certain acts of the United States in connection therewith, respondent's land had been damaged, and that the usefulness, enjoyment, and value



of her property had been destroyed. Compensation was sought for the taking (R. 5, 15-16). A demurrer to the petition (R. 17) having been overruled (R. 18), the United States answered (R. 77-80). Certain intervenors were made parties upon the motion of the United States (R. 25), and thereafter entered appearances (R. 28, 30, 32, 52, 66).<sup>1</sup>

The District Court, after a full trial, made extensive findings of fact and conclusions of law (R. 389, 350-366, 368-375), and filed an opinion (R. 376-390). These findings may be summarized as follows:

*Location and character of respondent's property.*—Respondent is the owner of certain land in Desha County, Arkansas, situated about two miles west of Arkansas City on the Mississippi River (R. 357). The land lies in the basin of the Boeuf River, which rises in the northern part of Desha County and flows south to the Ouachita River in Louisiana, forming a natural floodway for Mississippi water from the Mississippi River on the east, and the Arkansas and Flat rivers to the north (*id.*). Respondent's land has been repeatedly overflowed by deep high water, and has never been entirely free from overflow notwithstanding the construction of strong levees (*id.*). The land was

---

<sup>1</sup> This petition does not discuss those other respondents—lienors or claimants of the property—for the reason that their rights depend entirely upon the rights of respondent Spokenbarger. The District Court, accordingly, made no finding with respect to them (R. 389).



flooded in 1912, 1913, 1919, 1921, and 1922, and in 1927 the buildings and improvements on the land were destroyed by the flood of that year, which inundated the land to a depth of 15 or 20 feet (R. 357-358; 362).

*The Jadwin flood-control plan.*—Following the disastrous and unprecedented flood of 1927 the Chief of Engineers of the Army, Major General Edgar Jadwin, recommended to the Secretary of War a plan for flood control on the Mississippi River and its tributaries (R. 358). This plan, known as the Jadwin plan, was transmitted by the Secretary of War to the President, and by him to Congress (H. Doc. No. 90, 70th Cong., 1st Sess.) (R. 353).<sup>2</sup>

The Jadwin plan was a comprehensive one, dealing with the whole alluvial valley, and designed to protect it against the greatest predictable flood (R. 353, 354-355). Several devices were combined to that end. Levees were to be strengthened and raised slightly (R. 354). Safety valves were proposed in the form of floodways of two kinds, one headed by controlled spillways through which water could be diverted from the main channel of the river and the other headed by levees of lower grade (designated as fuseplug levees) over which water would escape into the floodways whenever it should overtop them (R. 354). One of the fuseplug levees contemplated the lowering of the existing

<sup>2</sup> For the convenience of the Court, nine copies of this document have been filed with the Clerk.

levees; in the others they were to remain unchanged (*id.*). Channel stabilization and navigation improvement were a part of the general project (R. 354, 355).

The plan contemplated the creation of a floodway down the Boeuf River Basin, where respondent's land is located (R. 355). The Boeuf River bottom was selected for this diversion because it was the most suitably located to receive the water, was the most direct route, had the best width, and was largely undeveloped swampland (R. 356). The entrance to the floodway was to be headed by a fuseplug levee at the then existing grade, corresponding to 60.5 feet on the Arkansas City gauge (R. 356, 357). The contiguous levees on the Mississippi and Arkansas rivers were to be raised about 3 feet (R. 356). In order to limit the land in the Boeuf Basin that would be overflowed by excess floods, so-called guide levees were to be constructed, where natural ridges would not serve, on each side of the Boeuf River bottom, from the proposed fuseplug levee to the lower Tensas Basin (*id.*). The west guide levee was to begin just below Rohwer and the east guide levee at Luna Landing, with the fuseplug levee, about 33 miles long, in between these two points (R. 356-357. See Plaintiff's Exh. 24, R. 396). Since the purpose of the fuseplug was to provide an escape for excess water down the leveed floodway only when the flood volume should exceed the safe capacity of the main channel of the river (R. 354), the floodway would

operate only when the water reached a height above 60.5 feet on the Arkansas City gauge (R. 356). That height had been reached only once, in 1927 (*id.*). The lands in the floodways retained the same measure of protection they had theretofore enjoyed, and the intent was to protect them against any recorded flood that had occurred, except that of 1927 and, possibly, those of 1912 and 1882 (R. 355).

*Action taken pursuant to the Plan.*—The Jadwin Plan was only tentative and general in character—a mere outline of flood control in the alluvial valley of the Mississippi River (R. 360). General Jadwin himself recognized that details of the design and location of the engineering works had to be worked out and recommended that the task be entrusted to the Chief of Engineers (*id.*). Actually, Congress, in the Flood Control Act of 1928 (Act of May 15, 1928, c. 569, 45 Stat. 534; U. S. C., Title 33, Sec. 702a) adopted the general engineering plan but did not adopt all of the features of the Plan, especially in view of the engineering differences between it and a plan submitted by the Mississippi River Commission (R. 352, 359). Section 1 of the Act provides, in part:

That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in \* \* \* House Document Numbered 90 \* \* \* is hereby

adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: \* \* \*

Section 1 also provides for the creation of a Board (the Mississippi River Flood Control Board) to consider the differences in detail between the Jadwin Plan and the report of the Mississippi River Commission, and to make recommendations to the President, whose decisions should be final. The Board reported on August 8, 1928 (Comm. Doc. No. 28, H. Comm. on Flood Control, 70th Cong., 2d Sess.) and on January 10, 1929, President Coolidge approved the construction of the guide levees in the Boeuf Floodway and the acquisition of rights-of-way for those levees (R. 379).

Thereafter, pursuant to the general authority of the Mississippi River Commission, independent of the 1928 Act, the levees on the south side of the Arkansas River were raised, giving the Boeuf Basin additional protection (R. 362). Moreover, by means of cut-offs and dredging, the Mississippi River has been shortened by 100 miles between Arkansas City and the Old River (R. 360). As a result, the height of the river has been lowered 5 or 6 feet. In the flood of 1937 there was a 20 percent greater flow past Arkansas City than in 1929, with a five-foot lower stage (R. 360-361). The greatest improvement has been in the vicinity of the Boeuf River fuseplug (R. 360), and has afforded additional protection to the land of respondent (R. 362).

The Boeuf River floodway, which was a separate and independent project provided for by the 1928 Act (R. 358), was never begun (*id.*), due to "local opposition" (R. 380). See *Hurley v. Kincaid*, 285 U. S. 95. The guide levees were never definitely located as an engineering fact (R. 356), and nothing has been done toward their construction (R. 359). The levee has been left at the 1914 grade for a distance of 60 miles, from Yancopin to Vauchuse (R. 379), whereas the contemplated fuse-plug levee was to have been only about 33 miles in length (R. 357). By the Act of June 15, 1936 (c. 548, 49 Stat. 1509; U. S. C. Supp., Title 33, Sec. 702a-2), Congress abandoned that part of the 1928 Act which affected the Boeuf Floodway, and in lieu thereof has created the Eudora Floodway (R. 359). The Boeuf Floodway is no longer considered a part of the plan for flood control (R. 361).

*Effect of the Plan on respondent's land.*—All improvements located on land immediately behind levees along the main stem of the Mississippi River, including those of respondent, are at all times of the flood stage of the river subject to extreme hazards (R. 363). They have no assurance against destruction by the breaking of the levees and the natural crevassing due to the flood water, irrespective of the height and strength of the levee (*id.*). Moreover, it is impossible to predict accurately what stages a flood may reach (*id.*). Respondent's land has been overflowed repeatedly by deep high water and has never been entirely free from over-



flow, despite the construction of strong levees (R. 357). The Boeuf Basin has always been a natural floodway; all the property lies in the natural high-water bed of the river and was always subject to the servitude of flooding (R. 354, 356, 357).

Nevertheless, the construction of cut-offs and channel stabilization and the reconstruction of the levees on the south bank of the Arkansas River have resulted in a greater protection and security to respondent's land than it has ever before had (R. 362, 366). The work done in other localities pursuant to the 1928 Act has in no way changed or reduced the levee protection to respondent's property or increased the flood hazard thereto (R. 366). Whereas respondent's land were repeatedly subject to overflow prior to the passage of the 1928 Act, they have at no time since been inundated by additional destructive flood waters that passed by reason of diversion from the Mississippi, nor by any act or project carried out by the United States since the passage of the Act despite the fact that three great floods, those of 1929, 1935, and 1937, have since occurred (R. 365).

Respondent's use, possession, and control of her land have not been interfered with or molested by the United States (R. 364). Neither it nor its officers have diverted any flood waters into the floodway (R. 365). No additional servitude has been placed upon respondent's land (*id.*). There has been no interference with any drainage system that affects respondent's land (*id.*). Any depreciation

on the market value of respondent's land from the 1926 price level has not been due to the passage of the 1928 Act, nor has it been the result of any action on the part of the United States through its officers, agents, or employees (R. 364).

On the basis of these findings, the District Court concluded, as a matter of law, that there had been no taking of respondent's property within the meaning of the Fifth Amendment (R. 368), and entered judgment for the United States (R. 94-96). The Circuit Court of Appeals, with Judge Woodrough dissenting, reversed the judgment and remanded the cause for further proceedings (R. 421).

**SPECIFICATION OF ERRORS TO BE URGED**

The court below erred—

1. In holding that there was a "taking" of respondent's property within the meaning of the Fifth Amendment.

2. In rejecting the finding of the District Court, supported by the evidence, that the Boeuf Basin floodway had never been begun, and in making the contrary finding that it was 90 percent complete and in operative condition.

3. In rejecting the finding of the District Court, supported by the evidence, that the protection afforded to respondent's land had been increased since the passage of the 1928 Act, and in making the contrary finding that respondent's protection from floods has been decreased.

4. In failing to hold that the Boeuf floodway has been abandoned by the Act of June 15, 1936, and in



making the contrary holding that the Boeuf floodway is in operative condition.

5. In holding that Congress, by the passage of the Flood Control Act of 1928, has adopted the Jadwin Plan as a fixed project in all of its essential features.

6. In holding that Congress, by the passage of the Flood Control Act of 1928, has assumed exclusive control of the fuseplug levee, thereby excluding property owners from their right of self-defense against floods.

7. In failing to hold that respondent's land was subject to a servitude of flooding.

8. In reversing the judgment in favor of the United States.

#### REASONS FOR GRANTING THE WRIT

##### I

THE DECISION OF THE COURT BELOW THAT RESPONDENT'S LAND HAS BEEN "TAKEN" WITHIN THE MEANING OF THE FIFTH AMENDMENT IS IN PROBABLE CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

A. The decision below is in probable conflict with *Sanguinetti v. United States*, 264 U. S. 146, and *Willink v. United States*, 240 U. S. 572, in which the elements of a "taking" have been defined.

In the *Sanguinetti* case a canal and diversion had been built to divert certain waters. The canal proved inadequate, and as a result the plaintiff's land was flooded. The land would have been flooded anyway, but to what extent did not appear.

The land was not permanently flooded, nor was it rendered useless for agriculture. The Court, reviewing the decisions, held that there had been no taking (264 U. S. at p. 149):

Under these decisions \* \* \* in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property. \* \* \* Prior to the construction of the canal the land had been subject to the same periodical overflow. If the amount or severity thereof was increased by reason of the canal, the extent of the increase is purely conjectural. Appellant was not ousted nor was his customary use of the land prevented, unless for short periods of time. \* \* \*

In the *Willink* case, in which the Government had moved a harbor line to include plaintiff's property, the Court reached the same conclusion, stating (240 U. S. at p. 579):

There was no actual taking of any of the claimant's property, nor any invasion or occupation of any of his land. As respects his upland, he was not in any wise excluded from its use, nor was his possession disturbed. Something more than the location of a harbor line across the land was required to take it from him and appropriate it to public use.

See also *Transportation Co. v. Chicago*, 99 U. S. 635, 642; *United States v. Lynah*, 188 U. S. 445, 470-471; *United States v. Cress*, 243 U. S. 316, 327-328.

We submit that the present case is directly within those decisions. Respondent's land, which is in the alluvial bed of the Mississippi River and has always been subject to flooding at frequent intervals, has not been invaded or disturbed. Her use, possession, and control, of her land has not been interfered with in any manner. No flood water has been diverted on her land. In fact, no flood has reached her property since 1927. No drainage system has been affected. In short, there has been, as in the *Sanguinetti* and *Willink* cases, a complete absence of any of the factors which constitute an appropriation for public use. The apprehension of a future taking does not, of course, warrant the recovery of compensation. *Peabody v. United States*, 231 U. S. 530; *Court of Marion County, W. Va. v. United States*, 53 C. Cls. 120, 150-151; *Kirk v. Good*, 13 F. Supp. 1020, 1021 (E. D. Mo.).

B. The decision of the court below is also in conflict with the decision of this Court in *Hughes v. United States*, 230 U. S. 24. In that case the United States constructed a new levee behind plaintiff's property in place of the old levee which had been between the property and the river. The lower court there had allowed a recovery on the ground that the change has placed an additional burden upon the property by subjecting it to more

frequent and destructive overflows. This Court reversed, on the ground that the plaintiff still had the same protection from the old levee and that he could not object because the United States had not chosen to build the new levee in front of his property. See also *Jackson v. United States*, 230 U. S. 1.

We submit that the present case is directly within the principle of this decision. The physical situation of respondent's land remains the same. The riverside levee remains at the same height and no liability can be fastened upon the United States simply because the height of the levee was not increased. Indeed, the present case is even stronger, for the District Court found (R. 362, 366) that the action taken by the United States under the 1928 Act has actually increased the protection for respondent's land over that which existed theretofore. Whereas her lands were formerly repeatedly subject to destructive overflows, they have not since been inundated, although there were great floods in 1929, 1935, and 1937 (R. 365). Moreover, the proposed plan for the Boeuf Basin floodway, has been abandoned by virtue of the Act of June 15, 1936, *infra*, p. 30. No guide levees have ever been built, and none ever will be. The riverside levee remains at the 1914 heights, and affords to respondent's property the same protection that it has always had, plus the additional protection that has been achieved by the strengthening of the levees on the

south bank of the Arkansas River and by the lowering of the Mississippi River through the scheme of channel stabilization. In fact, Congress has brought respondent's land within the doctrine of the *Hughes* case, *supra*, by specifically providing in Section 1 of the 1928 Act, *infra*, p. 24, that pending completion of any floodway the area within it shall be given the same degree of protection as is afforded by levees contiguous to the floodway.

C. It is difficult to state precisely the basis for the contrary conclusion of the majority of the court below. Apparently, however, the court assumed (1) that the flooding of respondent's land had become a "fixed fact" instead of, as formerly, a "casual and incidental happening" (R. 416); because (2) the Boeuf Basin floodway was substantially completed and in operative condition (R. 418-419); and (3) because Congress had deprived respondent of its right of flood fight by assuming exclusive jurisdiction over the fuseplug levee (R. 416). Finally, (4) the majority seemed to assume that their conclusion is supported by the decision in *Hurley v. Kincaid*, 285 U. S. 95. We submit that in each case the assumption is either unwarranted in fact or irrelevant in law.

(1) Actually, it is probably irrelevant whether or not respondent's land, which has been flooded frequently in the past, has been subjected to some purely conjectural increased liability to flooding. *Sanguinetti v. United States*, 264 U. S. 146, 199.



Cf. *Hughes v. United States*, 230 U. S. 24. Here, however, the District Court found as a fact that, due to the strengthening of the levees on the south side of the Arkansas River and the channel straightening and stabilization work, respondent's land enjoyed greater protection than it had prior to the passage of the 1928 Act (R. 362, 366). These findings, of course, were conclusive if supported by substantial evidence. *Wessel v. United States*, 49 F. (2d) 137, 139 (C. C. A. 8th); *United States v. Gamble-Skogmo*, 91 F. (2d) 372, 374 (C. C. A. 8th). The court below, however, without even advertent to these findings, concluded that respondent's land was subject to a greater hazard of flooding than before (R. 416-417). The District Court's finding, which was supported by the testimony and by the fact that serious floods since 1928 had not affected respondent's land (R. 159, 168, 171, 182, 243, 253), should have been deemed conclusive.

(2) The court below was apparently misled in this respect by its erroneous assumption that the Boeuf floodway was substantially completed and in operative condition at the time of the hearing (R. 418-419). The District Court found, on the contrary, that there had been no work whatever done on the floodway; that the riverside levee had not been changed; and that the guide levees had not been started (R. 359).

There is no question but that the District Court was correct in its finding. The difference apparently arises from the fact that the District Court found that the Boeuf floodway was a separate and independent project (R. 358), whereas the court below apparently assumed that the floodway was 90 percent finished (R. 418) because the whole flood-control plan on the Mississippi, as suggested by the 1928 Act, was completed to that extent. Obviously, however, the floodway cannot be so considered. Such an approach means, in effect, that respondent's land is taken by the action of the United States in increasing the height of the levees at other points—a proposition which has been specifically denied. *Jackson v. United States*, 230 U. S. 1. In addition, that approach means that the floodway does not require guide levees of any kind, a proposition contrary to the specific mandate of the Act itself (Section 1) that "all diversion works and outlets \* \* \* shall be built in a manner and of a character which will fully and amply protect the adjacent lands." Finally, that approach means that the floodway can exist without a fuseplug levee. The levee for considerable distances on each side of the fuseplug, approved by the President, p. 7, *supra*, is at the same height. Certainly the United States is not liable to owners of all land behind the other portions of the levee which remain at the 1914 level, yet they are in no different position than



respondent here.<sup>3</sup> The Boeuf floodway was never more than a plan, which has now been abandoned.

(3) Nor is the finding of the District Court that respondent's land had more, rather than less protection than it had in 1928 affected by the argument of the court below that Congress, by the 1928 Act, had assumed such absolute control over the levees that respondent no longer had a right of self-defense (R. 416). No liability attaches to the United States when in the exercise of its power over navigation and navigable waters it fixes the height at which levees may be constructed. *Matthews v. United States*, 87 C. Cls. 662, 718-719. See Sec. 1, Act of July 27, 1916 (c. 260, 39 Stat. 402; U. S. C., Title 33, Sec. 65), and *Gibson v. United States*, 166 U. S. 269, 276. But even if the contrary were true, in the present case Congress has ordered (Section 1) that, pending completion of the floodway, respondent's land was to be given its original protection. Actually, however, nothing in the Act indicates an assumption

---

<sup>3</sup> Moreover, the assumption that the Boeuf floodway is in operative condition is inconsistent with the further conclusion of the court (R. 419) that the Boeuf floodway has not been abandoned under the Act of June 15, 1936, *infra*, p. 30, because the Eudora floodway is not yet in operative condition. The only difference between the two floodways—the area subject to overflow—is determined by the guide levees, and if the Boeuf floodway was complete without them, so was approved. Respondent does not rely upon the fact that her land is in the Eudora floodway (R. 381).

of control. The War Department believes that the United States does not have such control, although it believes it would be desirable (Comm. Doc. No. 2, H. Comm. on Flood Control, 71st Cong., 1st Sess.; R. 252). The provision of Section 14 of the Act of March 3, 1899 (c. 425, 30 Stat. 1152; U. S. C., Title 33, Sec. 408), made applicable by Section 9 of the 1928 Act, and upon which respondent and apparently the court below relied, applies only to levees, etc., built by the United States, and consequently has no application to this levee which was built by local interests (R. 14-15). In fact, a provision to give the United States the control which the court below assumed to exist was in the original bill (S. 3740, 70th Cong., 1st Sess.) and was stricken out (69 Cong. Rec. 7114-7115).

(4) Finally, the extensive quotation (R. 417) by the court below from *Hurley v. Kincaid*, 285 U. S. 95, indicates that the court may have assumed that that case had decided the present question. The language, however, is plainly designated as an assumption—the most extreme possible in favor of the plaintiff there—in order to show that, whether or not the lands were taken, the injunctive relief there sought was inappropriate.

We submit, therefore, that the court below has misinterpreted and misapplied the decisions of this Court and that its action should be corrected.

## II

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THE COURT OF CLAIMS IN *MATTHEWS V. UNITED STATES*, 87 C. CLS. 662

In *Matthews, Trustee v. United States*, 87 C. Cls. 662, as in the present case, the plaintiff sought to recover for a "taking" of his land under the 1928 Flood Control Act, in circumstances very similar to those here. Plaintiff's land was located in the Birds Point Floodway, which was to be constructed by the building of a set-back levee some miles to the west of the riverside levee, and the reduction in height of portions of the latter by three feet. In times of flood, the river would overtop the reduced portions of the riverside levee and flow over plaintiff's land. The set-back levee had been built, but the riverside levee had not been cut down, when the suit was brought.

The Court of Claims denied recovery. It found no evidence that any additional water which might pass on the land would subject it to any additional servitude, and concluded (87 C. Cls. at pp. 720-721)—

Any action on the part of the Government which does not in and of itself encroach upon private property or valuable property rights by depriving the owner of the possession or use of a definitely existing right therein by the placing thereon of a burden or servitude, but which imposes only a temporary, occasional, or incidental injury or impairs the use of such property or property rights is

regarded as consequential damages and does not constitute a taking. The act of the Government or the clear intention to take such action must amount to a complete appropriation of a clearly existing property right. Contemplated or prospective encroachments, the direct effect and consequences of which are problematical and conjectural, do not give rise to an enforceable obligation to compensate.

It is apparent from the opinion that the Court of Claims would have found that no taking had occurred in the present case. Here *nothing* had been done in the construction of the floodway, and the project had been abandoned, whereas in the *Matthews* case the floodway was complete but for the lowering of the riverside levee. There is no distinction in principle between the two cases, and we submit that they are in direct conflict.

The decision below is also in direct conflict with the *Matthews* case in holding that there was a "taking" of respondent's land by the United States when it assumed control over the height of the fuse-plug levee. We have pointed out above (p. 18) that there is nothing to show that such control has been assumed, but the court below held to the contrary and further held that the result was to impose an additional burden on respondent's land for which the United States must pay compensation (R. 416). In the *Matthews* case, however, the court reached the opposite conclusion, stating (87 C. Cls. at p. 718):

The United States had the right, without liability, in the exercise of its lawful authority to control navigation and navigable waters, to fix the height at which the river-side levee might be constructed \* \* \*

### III

THE QUESTION AS TO WHAT ACTS CONSTITUTE A  
"TAKING" IS ALREADY PENDING IN THIS COURT

On May 15, 1939, this Court granted certiorari in the case of *Franklin v. United States*, No. 845, in which the Circuit Court of Appeals for the Sixth Circuit (101 F. (2d) 459) had held that the building of dykes into the bed of a river, which caused the channel to shift and wash away plaintiff's land, was not a "taking" within the meaning of the Fifth Amendment. The decision of that case will necessarily involve a consideration of the scope of the same decisions as are here involved. A review of this case, therefore, will impose little added burden upon the Court, but will materially aid in resolving conflicting interpretations of the prior decisions.

In addition, the decision in the *Franklin* case may be regarded by this Court as in conflict with the instant case. In the brief opposing certiorari in the former case the Government stated (p. 12 n) that it did not believe that the decisions were in conflict. The granting of the writ may indicate that the Court does not agree with that conclusion. If that be so, of course, the present case should also be reviewed.

## IV

THE QUESTION INVOLVED IS OF LARGE PUBLIC  
IMPORTANCE

A. The problem of flood control upon the Mississippi River, with its inevitable effect upon navigation and commerce, is one of extraordinary public importance. As history shows, constant experimentation is necessary, and each project is subject to change or abandonment in the light of cumulative experience. The court below did not fix the time when the taking occurred, but if, as respondent claims (R. 239), it occurred on January 10, 1929, when the construction of the guide levees was authorized, the decision is extremely significant with respect to whether the Government is free to abandon a project once it has been instituted. Compare *United States v. Yazoo & M. V. R. Co.*, 4 F. Supp. 366 (E. D. La.), rev'd., 67 F. (2d) 1019 (C. C. A. 5th). If the Government is forced immediately to pay prospective damages for permanent occupation, before the property is actually and irrevocably appropriated to public use, irrespective of whether the project is changed or abandoned, such a tremendous added cost would be imposed upon the United States as substantially to curtail, or even to prevent its possible participation in flood control work.

The present proceeding is a test case to determine whether the United States has "taken" the lands located in the Boeuf floodway. It is highly



important, therefore, that the correct result be reached, since that floodway is over 125 miles long and about 15 miles wide (see *Hurley v. Kincaid*, 285 U. S. 95, 100). In fact, there are already pending in the District Court of the United States for the Eastern District of Arkansas twelve cases, including the instant one, representing claims of about \$100,000. There are also pending, in the Court of Claims more than fifty cases, representing claims of several million dollars. All these cases deal with compensation for the alleged taking of property in the Boeuf Basin. Upon motion of the attorney for the respondent in the instant case all are being held in abeyance pending the final disposition of this case by this Court (R. 217-219).

#### CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,  
*Solicitor General.*

MAY 1939.



## APPENDIX

---

The Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534 (U. S. C., Title 33, Sec. 702a *et seq.*) provides as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: Provided, That a board to consist of the Chief of Engineers, the president of the Mississippi River Commission, and a civil engineer chosen from civil life to be appointed by the President, by and with the advice and consent of the Senate, whose compensation shall be fixed by the President and be paid out of the appropriations made to carry on this project, is hereby created; and such board is authorized and directed to consider the engineering differences between the adopted project and the plans recom-*

mended by the Mississippi River Commission in its special report dated November 28, 1927, and after such study and such further surveys as may be necessary, to recommend to the President such action as it may deem necessary to be taken in respect to such engineering differences and the decision of the President upon all recommendations or questions submitted to him by such board shall be followed in carrying out the project herein adopted. The board shall not have any power or authority in respect to such project except as hereinbefore provided. Such project and the changes therein, if any, shall be executed in accordance with the provisions of section 8 of this Act. Such surveys shall be made between Baton Rouge, Louisiana, and Cape Girardeau, Missouri, as the board may deem necessary to enable it to ascertain and determine the best method of securing flood relief in addition to levees, before any flood-control works other than levees and revetments are undertaken on that portion of the river: *Provided*, That all diversion works and outlets constructed under the provisions of this Act shall be built in a manner and of a character which will fully and amply protect the adjacent lands: *Provided further*, That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay, or in anywise interfere with the execution of that part of the project on the east side of the river, including raising, strengthening, and enlarging the levees on the east side of the river. The

sum of \$325,000,000 is hereby authorized to be appropriated for this purpose.

All unexpended balances of appropriations heretofore made for prosecuting work of flood control on the Mississippi River in accordance with the provisions of the Flood Control Acts approved March 1, 1917, and March 4, 1923, are hereby made available for expenditure under the provisions of this Act, except section 13.

SEC. 2. That it is hereby declared to be the sense of Congress that the principle of local contribution toward the cost of flood-control work, which has been incorporated in all previous national legislation on the subject, is sound, as recognizing the special interest of the local population in its own protection, and as a means of preventing inordinate requests for unjustified items of work having no material national interest. As a full compliance with this principle in view of the great expenditure estimated at approximately \$292,000,000, heretofore made by the local interests in the alluvial valley of the Mississippi River for protection against the floods of that river; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce, and the movement of the United States mails; and, in view of the gigantic scale of the project, involving flood waters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required.

SEC. 3. Except when authorized by the Secretary of War upon the recommendation of the Chief of Engineers, no money appro-

priated under authority of this Act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river, it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

SEC. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: *Provided*, That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.

The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights-of-way which, in the opinions of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right-of-way is located. In all such proceedings the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of any land, easement, or right-of-way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price; and the Secretary of War is also authorized to accept donations of lands, easements, and rights-of-way required for this project. The provisions of sections 5 and 6 of the River and Harbor Act of July 18, 1918, are hereby made applicable to the acquisition of lands, easements, or rights-of-way needed for works of flood control: *Provided*, That any land acquired under the provisions of this section shall be turned



over without cost to the ownership of States or local interests.

SEC. 8. The project herein authorized shall be prosecuted by the Mississippi River Commission under the direction of the Secretary of War and supervision of the Chief of Engineers and subject to the provisions of this Act. It shall perform such functions and through such agencies as they shall designate after consultation and discussion with the president of the commission. For all other purposes the existing laws governing the constitution and activities of the commission shall remain unchanged. The commission shall make inspection trips of such frequency and duration as will enable it to acquire first-hand information as to conditions and problems germane to the matter of flood control within the area of its jurisdiction; and on such trips of inspection ample opportunity for hearings and suggestions shall be afforded persons affected by or interested in such problems. The president of the commission shall be the executive officer thereof and shall have the qualifications now prescribed by law for the Assistant Chief of Engineers, shall have the title brigadier general, Corps of Engineers, and shall have the rank, pay, and allowances of a brigadier general while actually assigned to such duty: *Provided*, That the present incumbent of the office may be appointed a brigadier general of the Army, retired, and shall be eligible for the position of president of the commission if recalled to active service by the President under the provisions of existing law.

The salary of the president of the Mississippi River Commission shall hereafter

be \$10,000 per annum, and the salary of the other members of the commission shall hereafter be \$7,500 per annum. The official salary of any officer of the United States Army or other branch of the Government appointed or employed under this Act shall be deducted from the amount of salary or compensation provided by, or which shall be fixed under, the terms of this Act.

SEC. 9. The provisions of sections 13, 14, 16, and 17 of the River and Harbor Act of March 3, 1899, are hereby made applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this Act.

The Act of June 15, 1936 (c. 548, 49 Stat. 1508; U. S. C. Supp., Title 33, Sec. 702a-2, *et seq.*) amending the Flood Control Act of 1928, provides as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the project for the control of floods of the Mississippi River and its tributaries, adopted by Public Act Numbered 391, approved May 15, 1928 (45 Stat. 534), Seventieth Congress, entitled "An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes", is hereby modified in accordance with the recommendations of section 43 of the report submitted by the Chief of Engineers to the Chairman of the Committee on Flood Control, dated February 12, 1935, and printed in House Committee on Flood Control Document Numbered 1, Seventy-fourth Congress, first session, as hereinafter further modified and amended; and as so modified is hereby adopted and authorized and directed to be prosecuted*



under the direction of the Secretary of War and the supervision of the Chief of Engineers.

SEC. 2. That the Boeuf Floodway, authorized by the provisions adopted in the Flood Control Act of May 15, 1928, shall be abandoned as soon as the Eudora Floodway, provided for in Flood Control Committee Document Numbered 1, Seventy-fourth Congress, first session, is in operative condition and the back-protection levee recommended in said document, extending north from the head of the Eudora Floodway, shall have been constructed.

\* \* \* \* \*

SEC. 10. After the Eudora Floodway shall have been constructed and is ready for operation, the fuse-plug levees now at the head of the Boeuf and Tensas Basins shall be constructed to the 1914 grade and the 1928 section. The fuse-plug levees at the head of the Atchafalaya Basin on the west side shall be constructed to the 1914 grade and the 1928 section. The fuse-plug levees at the head of the Atchafalaya Basin on the east side of the Atchafalaya River shall be constructed to the 1914 grade and 1928 section, and, after the Morganza Floodway has been completed, shall be raised to the 1928 grade as provided in section 3 of this Act. Thereafter those stretches of said levees which are left as fuse-plug levees shall be reconstructed and maintained as herein provided, subject to the provisions of section 3 of this Act. Any funds appropriated under authority of this Act may be expended for this purpose.

